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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MATTI I. SCHULTZ,
Petitioner,

VS.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether overwhelming statistical evidence of age discrimination in a disparate treatment case is admissible.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals that gives rise to this petition is reported at 105 F.3d 1258 and is reproduced in Appendix B filed herewith at page A-2. By Order filed March 5, 1997, the Eighth Circuit Court of Appeals denied the Suggestion for Rehearing En Banc and Petition for Rehearing. Appendix A at page A-1. The unreported Memorandum and Order of the District Court in this case is reproduced in Appendix C at page A-5.

STATEMENT OF JURISDICTION

Upon trial before a jury in the United States District Court for the Eastern District of Missouri on Petitioner's claim of age discrimination pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 et seq., a verdict was rendered in favor of Respondent. After judgment was entered in favor of Respondent, Petitioner timely filed a Motion for New Trial, which was denied on February 21, 1996. On March 8, 1996, Petitioner timely filed a Notice of Appeal to the Eighth Circuit Court of Appeals, which affirmed in an opinion filed on February 5, 1997. On March 5, 1997 the Eighth Circuit denied Petitioner's timely-filed Suggestion for Rehearing En Banc and Petition for Rehearing. This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Suggestion for Rehearing En Banc and Petition for Rehearing.

The Court's jurisdiction to review the Order of the United States Court of Appeals for the Eighth Circuit affirming the District Court's denial of Petitioner's Motion for New Trial is invoked under 28 U.S.C §1254 (1).

STATUTE INVOLVED

The pertinent provision of the Age Discrimination in Employment Act , 29 U.S.C. §623 et seq. ("ADEA"), is set forth below:

> §623. Prohibition of age discrimination
>
> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Matti Schultz was born on January 4, 1935 and was 57-1/2 years of age when he was terminated from his employment with McDonnell Douglas Corporation (hereinafter "MDC") in a reduction in force in September, 1992 after working for MDC for approximately 22-1/2 years. Schultz alleges that the reduction in force was used as a pretext to terminate him on the basis of his age. It is undisputed by MDC that Schultz performed his job well. Schultz worked in the Advanced Manufacturing Technology (AMT) Department in the Production Operations Division of McAIR, a component of MDC. At the time of his layoff in September, 1992, Schultz was a non-management employee, classified as a Specialist, after having previously been in man-

agement for 10 years and then having been downgraded to the non-management Specialist classification in January, 1991, near in time to a previous reduction in force.

Pursuant to a company Administrative Bulletin dated August 14, 1992, titled "Management Rightsizing", the President of the McAIR component of MDC indicated that management would be reduced by approximately 10% within the next several weeks. However, in spite of this Administrative Bulletin, the AMT Department Head testified that he was instructed by upper management in the Production Operations Division to terminate one non-management employee (ie., a "Specialist"), and not a manager, from the AMT Department. Schultz was the only employee terminated from the AMT Department as part of the September, 1992 Management Rightsizing reduction in force. The AMT Department consisted of approximately 30 employees. The AMT Department Head testified that Schultz was chosen for layoff because Schultz had received the lowest combined ratings among all of the Specialists in the AMT Department on the 1991 evaluation and on the mid-year 1992 evaluation.

At trial, Schultz attempted to put forth *overwhelming* statistical evidence at the Production Operations Division level in order to show age discrimination. Schultz attempted to put forth this evidence through his designated statistical expert witness, Professor James D. Evans. However, United States District Judge Edward L. Filippine refused Schultz' request to put forth this overwhelming statistical evidence.

In order to evoke the sympathy of the jury, MDC put forth ample evidence at trial indicating that it had laid off a substantial number of employees throughout the company. Given that MDC was able to present such background evidence of large-scale layoffs throughout MDC, Schultz, out of fairness, should likewise have been allowed to present *overwhelming* statistical evidence showing how in fact this layoff was carried out, in that

the layoff consisted *almost entirely of older employees*. Instead, Schultz was limited at trial to presenting evidence *solely* at his department level, consisting of approximately 30 employees of which he was the fourth oldest employee and the only employee terminated. Had Schultz been allowed to present this overwhelming statistical evidence at the Production Operations Division level, he would have shown that there were 33 employees terminated in the Rightsizing reduction in force in the Production Operations Division, and that *19 of these 33 employees were over age 55*. Schultz was age 57-1/2 at the time of his termination.

A graph of the termination rates in the Rightsizing reduction in force in the Production Operations Division by five-year age groups is marked as Appendix D at page A-8. This graph *clearly* shows that an unusually high percent of employees age 55 and over were terminated in the Production Operations Division relative to other age categories. Had Schultz been allowed to present this overwhelming statistical evidence of age discrimination, his expert witness would have testified that the age distribution termination rates shown as Appendix D would occur by chance less often than *once in ten-thousand* such reductions in force. In addition, Schultz' expert witness would have testified that the termination rate of the group of employees age 55 and above was *more than six times* that of the group of employees less than age 55 and that a termination rate discrepancy this large would have less than a *one in one-hundred million* chance of occurring if no age-related factor was involved in the reduction in force. Schultz believes that had he been able to present to the jury such overwhelming statistical evidence of age discrimination at the Production Operations Division level, the jury would have returned a verdict in his favor.

Schultz believes that this overwhelming statistical evidence of age discrimination at the division level is unquestionably relevant and should have been admitted into evidence for the jury

to consider because there was a direct link between Schultz' discharge and activity at the Production Operations Division level. That is, there was sufficient evidence that the layoff decision was *not* made in a vacuum at the AMT Department level but instead was made through the collaboration of upper level management in the Production Operations Division. By way of example, the MDC Administrative Bulletin pertaining to the Management Rightsizing reduction in force in which Schultz was laid off contained the following language:

> "I assure you this management reduction was taken only after tedious and tireless review and analysis of the skills, relative performance and versatility of *each* of our managers. *All division heads and program managers have been involved in the extremely difficult process of determining how to meet this objective.*" (emphasis added).

Upon trial before a jury on Schultz' claim of age discrimination, in which he was not allowed to present the overwhelming statistical evidence at the Production Operations Division level but instead was limited in the presentation of his evidence *solely* to the AMT Department consisting of approximately 30 employees, in which he was the fourth oldest employee and the only employee terminated, a verdict was rendered in favor of MDC. After judgment was entered in favor of MDC, Schultz filed a Motion for New Trial, based on the exclusion of the overwhelming statistical evidence at the Production Operations Division level, which was denied by District Judge Edward L. Filippine on February 21, 1996. (Appendix C at page A-5). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's denial of Schultz' Motion for New Trial. The Eighth Circuit Court of Appeals held that the District Court did not abuse its discretion in excluding the statistical evidence because the statistics purportedly did not evaluate comparable employees and the statistical evidence did not incorporate the performance ratings of the employees. (Appendix B at page A-2).

REASONS FOR GRANTING THE WRIT

The decision below presents an important question and directly conflicts with established Supreme Court precedent concerning the admissibility of statistical evidence. For instance, in *McDonnell Douglas Corporation vs. Green*, 411 U.S. 792, 804-805, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973), this Court clearly noted the importance of statistical evidence: "Other evidence that may be relevant to any showing of pretext includes . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.". Thereafter, in *International Brotherhood of Teamsters vs. United States*, 431 U.S. 324, 339-340, 97 S.Ct. 1843, 1856-1857, 52 L.Ed. 2d 396 (1977), this Court clearly held: "Our cases make it unmistakably clear that 'statistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. *Mayor of Philadelphia vs. Educational Equality League*, 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed. 2d 630. See also *McDonnell Douglas Corporation vs. Green*, 411 U.S., at 805, 93 S.Ct., at 1825. cf. *Washington vs. Davis*, 426 U.S. 229, 241-242, 96 S.Ct. 2040, 2048-2049, 48 L.Ed.2d 597. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases . . . Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."

Furthermore, the decision below is in direct conflict with other Circuits on questions concerning the admissibility of statistical

evidence. For instance, in *Denison vs. Swaco Geolograph Company*, 941 F.2d 1416, 1424 (10th Cir. 1991), which was a disparate treatment case alleging age discrimination brought by a former employee challenging his dismissal after a merger, the Tenth Circuit held that: "Statistics alone may be used to establish a prima facie case of discrimination in a disparate treatment case. ... Statistical data is plainly admissible to show that an employer's proffered reason for terminating the plaintiff is purely pretext.", citing *McDonnell Douglas vs. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed. 2d 668 (1973); and *McAlester vs. United Airlines, Inc.*, 851 F.2d 1249, 1258 (10th Cir. 1988). In addition, in *Laugesen vs. Anaconda Company*, 510 F.2d 307, 317 (6th Cir. 1975), which was also a disparate treatment case alleging age discrimination, the Sixth Circuit held that evidence of a general pattern of age discrimination or the absence of it is material in a private civil action for individual discrimination. The Sixth Circuit noted that: *"McDonnell Douglas vs. Green, supra,* itself a wholly private action, specifically approves the use of such statistics." Therfore, the Sixth Circuit held that allegations that the trial court erroneously admitted into evidence certain bar graphs showing the practices of Anaconda respecting the retention and termination of employees by age go mostly to the weight to be accorded them, an issue to be left to the jury, and not their admissibility. Furthermore, in *Abrams vs. Lightolier, Inc.*, 50 F.3d 1204, 1216-1217 (3rd Cir. 1995), which was also a disparate treatment case alleging age discrimination, Lightolier argued on appeal that Abrams improperly introduced "pattern and practice" evidence that was not relevant to his claim and highly prejudicial, wherein the admission of this evidence required a new trial, because Abrams brought his claim as an individual disparate treatment case. Citing *Furnco Construction Corporation vs. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978), the Third Circuit found Lightolier's arguments unpersuasive and held that: "Employment discrimination plaintiffs are not precluded from introducing statistical

evidence as circumstantial evidence of discrimination in a disparate treatment case." Finally, in *Equal Employment Opportunity Commission vs. O&G Spring and Wire Forms Specialty Company*, 38 F.3d 872, 876 (7th Cir. 1994), cert. denied, 115 S. Ct. 1270, 131 L.Ed.2d 148 (1995), which was also a disparate treatment case but alleging race discrimination, the Seventh Circuit noted that while reliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent, in some cases statistical disparities alone may prove intent. Citing *International Brotherhood of Teamsters vs. United States*, 431 U.S. 324, 339-40 n.20, 97 S.Ct. 1843, 1857 n.20, 52 L.Ed.2d 396 (1977), the Seventh Circuit held that: "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination . . . Appropriate statistical evidence can also be sufficient to establish a pattern and practice of discrimination—or in other words, that the alleged discriminatory hiring practices were 'more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts.'"

I. OVERWHELMING STATISTICAL EVIDENCE OF AGE DISCRIMINATION IN A DISPARATE TREATMENT CASE SHOULD BE ADMISSIBLE

The Eighth Circuit's decision below held that Schultz' statistical evidence was properly excluded at trial because the statistics purportedly did not evaluate comparable employees and because the statistical evidence did not incorporate the performance ratings of the employees. However, the Eighth Circuit failed to recognize that because of the fluid nature of the workforce at MDC, due to its constant shuffling of employees and changing of job titles, and because the Rightsizing reduction in force affected not just management but non-management employees as well, including Specialists, it is impossible, and even redundant, to compare "apples to apples" and thereby

attempt to evaluate "comparable" employees. Furthermore, there was ample credible evidence presented at trial which indicated that the performance ratings and the termination decisions allegedly based on the performance ratings were unjustified or inconsistent. By way of example, there was evidence that young employees either had worse performance evaluations but yet were given better overall relative performance ratings and were not terminated, or that young employees were given poor overall relative performance ratings but still were not terminated. The Eighth Circuit failed to recognize that to make a proper statistical analysis of performance ratings, when the performance ratings themselves and the termination decisions allegedly based on these performance ratings are unjustified or inconsistent, is implausible and cannot be done with any degree of reliability.

The Eighth Circuit's view of the evidentiary value of Schultz' statistics was plainly incorrect. Even assuming that certain variables were not present in Schultz' statistics, this merely rendered the analysis less probative than it otherwise might have been, but *not* inadmissible. Clearly, Schultz' statistical analysis, which properly accounted for the major factors (ie., the termination rates, by age, of *all* employees, regardless of their title, eligible for layoff in the Rightsizing reduction in force), *is* acceptable evidence of discrimination. The Supreme Court has *clearly* held that although the failure to include certain variables may affect an analysis' probativeness, it does *not* affect its admissibility. *Bazemore vs. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986). See also *Equal Employment Opportunity Commission vs. O&G Spring and Wire Forms Specialty Company*, 38 F.3d 872, 876 (7th Cir. 1994), cert. denied, 115 S. Ct. 1270, 131 L.Ed 2d 148 (1995), *citing Bazemore vs. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009, 92 L.Ed. 2d 315 (1986) ("A statistical model in a discrimination case need not be completely specified and some arguably relevant variables can be omitted in certain cases."); and *Mangold vs. Cali-*

fornia Public Utilities Commission, 67 F.3d 1470, 1476 (9th Cir. 1995) (Merely because the statistics do not isolate a certain variable, such as, in this case, the 40-and-above category, does not render the statistics irrelevant. Rather, this goes to the *weight*, and *not* to the admissibility, of the statistical evidence.)

Furthermore, in order to evoke the sympathy of the jury, MDC put forth ample evidence at trial indicating that it had laid off a substantial number of employees throughout the company. Given that MDC was able to present such background evidence of large-scale layoffs throughout the company, Schultz, out of fairness, should likewise have been allowed to present overwhelming statistical evidence at the Production Operations Division level showing how in fact the layoff was carried out, in that the layoff consisted *almost entirely of older employees*. Instead, Schultz was limited at trial to presenting evidence *solely* at his department level, consisting of approximately 30 employees of which he was the fourth oldest employee and the only employee terminated. This overwhelming statistical evidence at the Production Operations Division level would have shown that there were 33 employees terminated in the Rightsizing reduction in force in the Production Operations Division, and that *19 of these 33 employees were over age 55*. Furthermore, this overwhelming statistical evidence at the Production Operations Division level would have shown that the termination rate of the employees age 55 and above was *more than six times* that of the employees less than age 55 and that a termination rate discrepancy this large would have less than a *one in one- hundred million* chance of occurring if no age-related factor was involved in the reduction in force.

The Eighth Circuit's decision affirming the District Court's exclusion of the overwhelming statistical evidence at the Production Operations Division level was *clearly* prejudicial to Schultz and its admission into evidence would *clearly* have made a difference in the outcome of the trial, in that Schultz'

proffered statistical evidence would have shown *overwhelming* evidence of age discrimination. This evidence was especially relevant because there was a direct link between Schultz' discharge and activity at the Production Operations Division level. Given that Schultz was the only employee terminated in the AMT Department consisting of approximately 30 employees, such overwhelming evidence of terminating primarily employees over age 55 in the Production Operations Division would *clearly* have influenced the jury and would have enabled the jury to find that Schultz was terminated on the basis of his age.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1703 EMSL

Matti I. Schultz,
Appellant,

vs.

McDonnell Douglas Corporation,
Appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 5, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1703

Matti I. Schultz,
Plaintiff/Appellant,

v.

McDonnell Douglas Corporation,
Defendant/Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: December 12, 1996

Filed: February 5, 1997

Before WOLLMAN and MURPHY Circuit Judges, and TUNHEIM,[1] District Judge.

MURPHY, Circuit Judge.

Matti Schultz was discharged by his employer, the McDonnell Douglas Corporation, which he then sued for age discrimination under 29 U.S.C. § 621 et seq., and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 et seq.[2] After a six day trial a jury found in favor of McDonnell Douglas, and the district court[3]

[1] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

[2] Schultz also alleged interference with his pension benefits under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. S 1001 et. seq., and national origin discrimination under Title VII, 42 U.S.C. S 2000a et seq. and state law. These claims were dismissed prior to trial, and they are not involved in this appeal.

[3] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

ordered judgment entered in favor of the corporation. Schultz appeals from the denial of his motion for a new trial based on the exclusion of certain statistical evidence. We affirm.

Schultz was a principal technical specialist when he was discharged as part of a reduction in force. In the two performance evaluations before the reduction in force, Schultz had been given the lowest overall ratings of any of the sixteen specialists in his department. Schultz, who was fifty-seven and the fourth oldest specialist in his department when discharged, was the only specialist in that department to be terminated. At trial he attempted to introduce statistical evidence demonstrating a pattern of age discrimination by McDonnell Douglas. The statistics were based on data taken from the company's Production Operations Division, which consisted of 3,731 employees.

The district court excluded the statistical evidence from the divisional level because it was not based on comparable employees, citing *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 252 (8th Cir. 1995), and *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 777 (8th Cir. 1995). The statistics dealt with a much larger group of employees than the district court found relevant; they were not comparable in its view because they did not include performance evaluations.

Schultz contends that he had offered additional evidence of age animus at the departmental level to show the reasons offered for discharge were pretextual. He also claims that there was evidence demonstrating the involvement of managers at the higher divisional level in his termination.[4] This would have made the divisional level statistical evidence relevant, and it should have been admitted. He seeks a new trial so that he can present the statistics.

---

[4] This evidence was excluded at trial and Schultz has not claimed this ruling was erroneous.

We review the denial of a motion for a new trial under an abuse of discretion standard. *McKnight v. Johnson Controls. Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994). The admissibility of evidence is also within the trial court's discretion. The question presented on the post-trial motion was whether exclusion of the evidence was "so prejudicial as to require a new trial which would be likely to produce a different result." *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

The district court did not abuse its discretion in excluding the statistical evidence. While it is true that *MacDissi v. Valmont Indus. Inc.*, 856 F.2d 1054 (8th Cir. 1988), indicated that other evidence of discrimination may add to the relevance of statistical evidence, it did not contradict the rule that the statistics must evaluate comparable employees to be meaningful indicators of pretext. 856 F.2d at 1058-59; *Hutson*, 63 F.3d at 778 (discussing *MacDissi*). Even if the decision to discharge Schultz had been made with the involvement of division level managers, he has not shown that the 3,731 division employees reflected in the statistics were comparable to him. McDonnell Douglas claimed Schultz was selected for discharge because of his performance ratings, and the statistical evidence did not incorporate the performance ratings of other employees. The probative value of statistical evidence that does not reflect significant differences among employees would be prejudicial and misleading. *See* Fed. R. Evid. 403.

For these reasons the district court did not err in denying the motion for a new trial. Accordingly, its order is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV00718 ELF

MATTI I. SCHULTZ,
Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION,
Defendant.

MEMORANDUM AND ORDER

[Filed: Feb. 21, 1996]

This matter is before the Court on plaintiff's motion for new trial [document #88].

By this motion, plaintiff seeks a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. His motion states that the Court erred in not allowing him to offer at trial statistical evidence at the Production Operations Division level. Plaintiff argues that under *MacDissi v. Valmont Industries. Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988), as long as a plaintiff sets forth "additional" grounds for disbelieving an employer's explanation for termination, statistics may be presented regarding the defendant's treatment of employees who are not necessarily comparable to plaintiff. Plaintiff claims that he presented ample credible evidence at the department level to prove the additional grounds necessary and, therefore, the Court should have allowed him to present statistics beyond merely the departmental level. He claims these statistics are especially important in light of the fact that the Supervisory Guidelines for Reduction in Force indicate that the division head is to review and approve terminations. Plaintiff's Exhibit 15.

Defendant correctly notes that the evidence relied upon by plaintiff is the same evidence that was considered and rejected by the United States Court of Appeals for the Eighth Circuit in *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995). As defendant argues, plaintiff's statistical evidence is "not probative of pretext in that it fails to analyze the treatment of comparable employees." *Hutson, supra,* at 777; *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 252 (8th Cir. 1995). The *Hutson* court emphasized that although in certain instances, statistical evidence may be probative of pretext, *MacDissi* did not eliminate the requirement that such statistics must analyze the treatment of "comparable employees." *Hutson, supra,* at 778.

Defendant notes that in the case at bar, the proposed statistics examine the entire Production Operations Division, consisting of 3,731 employees, although plaintiff was compared to only fifteen other specialists in his department. Even if, as plaintiff asserts, the reduction in force ("RIF") were not limited to specialists, but included management, the statistics would still be deficient because they do not take into account plaintiff's low relative performance ratings, which were proffered as the basis of defendant's decision to terminate plaintiff. Faced with the same type of statistical evidence, analyzed by the same expert, the *Nitschke* court stated, "Since McDonnell Douglas used performance evaluations to determine which workers to lay off, in order to prevail, [plaintiff] would have to show that McDonnell Douglas treated *comparably rated employees differently.*" *Nitschke*, 68 F.3d at 252 (emphasis added). *See also Hutson, supra,* at 777 (addressing same type of statistics and concluding that "[plaintiff's] statistical evidence is not probative of pretext in that it fails to analyze the treatment of comparable employees") (citing *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (where pretext argument is based on comparisons of employees, plaintiffs must show that employees are ""'similarly situated in all relevant aspects'"") (citations omitted)). The

statistical analysis proposed by plaintiff does not make such a determination. Plaintiff erroneously focuses on a much larger group — the group of employees subject to the layoff; yet the fact that employees are subject to a layoff does not make the employees "comparable" to each other. At trial, plaintiff *was* allowed to present evidence of alleged disparity in treatment among similarly rated employees. Furthermore, because the statistics fail to take into account the relative assessment scores, the statistics would not become any more relevant even if, as plaintiff asserts, there were sufficient evidence that the decision to terminate plaintiff was made at the Production Operation Division level.

Finally, although plaintiff accords great weight to the fact that the courts in *Hutson* and *Nitschke* found no "additional evidence" of age discrimination, that fact was only an *alternate* reason for not considering the statistical evidence. The primary reason for not considering it was that it failed to analyze comparably rated employees. *See Hutson, supra*, at 778; *Nitschke, supra*, at 252.[1]

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for new trial [document #88] is DENIED.

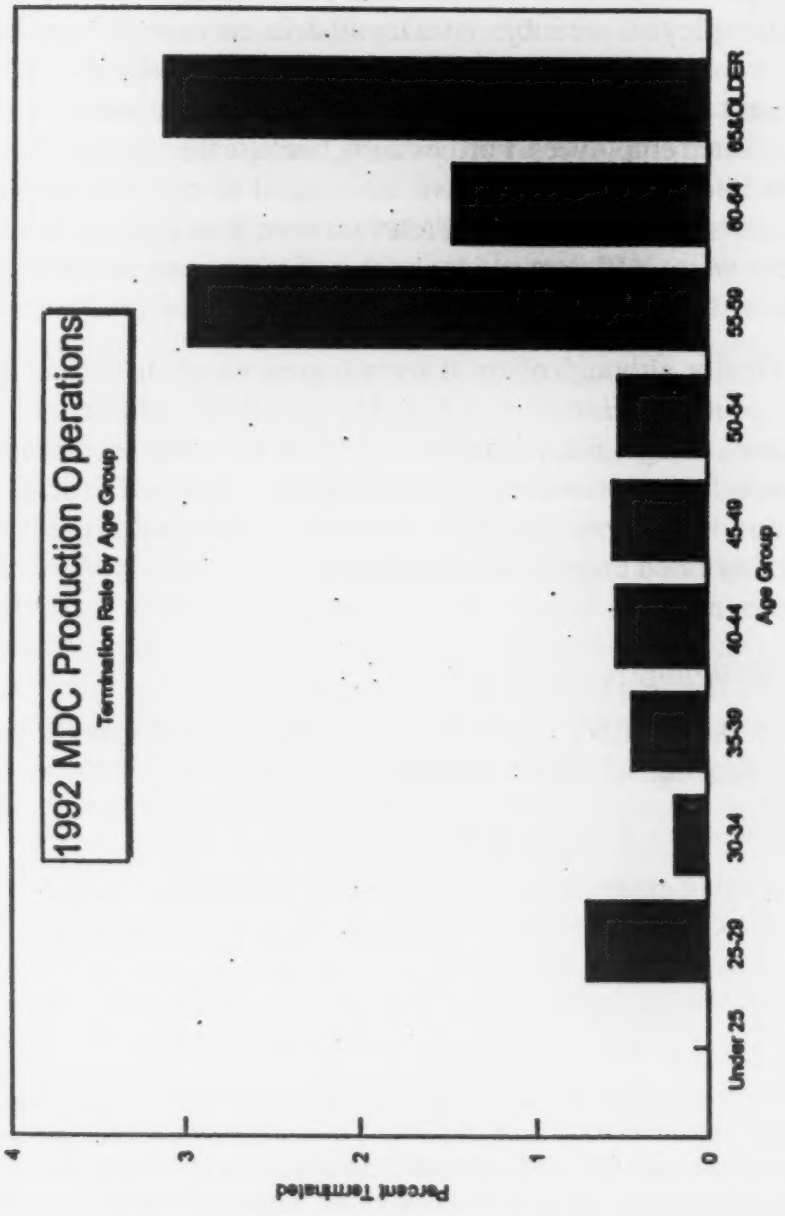
Dated this 21st day of February, 1996

/s/ Edward L. Filippine
United States District Judge

---

[1] Plaintiff argues that according to Eighth Circuit case law, courts should liberally admit statistics as important background evidence of discrimination. However, in the cases cited by plaintiff, the defendants did not rely on relative assessment scores and in some of the cases, statistical evidence was not at issue. Moreover, these cases cannot be read to stand for broad propositions regarding the admissibility of the type of statistics offered here.

APPENDIX D


1992 MDC Production Operations
Termination Rate by Age Group
Percent Terminated
0
1
2
3
4
Under 25
25-29
30-34
35-39
40-44
45-49
50-54
55-59
60-64
65&OLDER
Age Group